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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 MARIA DEL SOCORRO QUINTERO  
12 PEREZ C.Y., a Minor, and B.Y., a  
Minor,

13 Plaintiffs,

14 vs.

15 UNITED STATES OF AMERICA,  
16 UNITED STATES DEPARTMENT  
OF HOMELAND SECURITY,  
17 UNITED STATES CUSTOMS AND  
BORDER PROTECTION OFFICE OF  
BORDER PATROL, JANET  
18 NAPOLITANO, THOMAS S.  
WINKOWSKI, DAVID AGUILAR,  
ALAN BERSIN, KEVIN K.  
19 McALEENAN, MICHAEL J.  
FISHER, PAUL A. BEESON,  
20 RICHARD BARLOW, RODNEY S.  
SCOTT, CHAD MICHAEL NELSON,  
21 and DORIAN DIAZ, and DOES 1-50,

22 Defendants.

CASE NO. 13cv1417-WQH-  
BGS

ORDER

23 HAYES, Judge:

24 The matters before the Court are: (1) the Motion to Dismiss (ECF No. 26) filed  
25 by Defendants United States of America, United States Department of Homeland  
26 Security (“DHS”), United States Customs and Border Protection (“CBP”), and Office  
27 of Border Patrol (“OBP”) (collectively “the Government Defendants”), together with  
28 Janet Napolitano, Thomas Winkowski, Alan Bersin, Kevin McAleenan, Michael Fisher,

1 Paul Beeson, Richard Barlow, and Rodney Scott (collectively “the Supervisor  
2 Defendants”);<sup>1</sup> (2) the Motion to Dismiss (ECF No. 27) filed by the Supervisor  
3 Defendants in their individual capacities<sup>2</sup> and Chad Nelson and Dorian Diaz  
4 (collectively “the Agent Defendants”); and (3) the Motion for Leave to Conduct  
5 Jurisdictional Discovery filed by Plaintiffs (ECF No. 31).

## 6 **I. Background**

7 On June 17, 2013, Plaintiffs Maria Del Socorro Quintero Perez (“Del Socorro”),  
8 the widow of Jesus Alfredo Yañez Reyes (“Yañez”), and CY and BY, the minor  
9 children of Yañez, commenced this action, seeking damages for the death of Yañez, as  
10 well as declaratory relief. (ECF No. 1). On January 2, 2014, Plaintiffs filed the First  
11 Amended Complaint (“FAC”), which is the operative complaint. (ECF No. 25). On  
12 February 18, 2014, the Government Defendants and Supervisor Defendants sued in  
13 their official capacities filed the pending Motion to Dismiss Plaintiffs’ First Amended  
14 Complaint. (ECF No. 26). The Government and Supervisor Defendants assert that all  
15 of Plaintiffs’ claims should be dismissed against them on grounds of sovereign  
16 immunity. In addition, they seek dismissal of Plaintiffs’ Eighth Claim for Declaratory  
17 Judgment as moot and unripe. Finally, the Government Defendants and Supervisor  
18 Defendants seek dismissal of Plaintiffs’ request for attorney’s fees as unrecoverable.

19 On the same date, the Supervisor Defendants sued in their individual capacities  
20 and the Agent Defendants filed the pending Motion to Dismiss Plaintiffs’ First  
21 Amended Complaint. (ECF No. 27). The Supervisor Defendants and Agent  
22 Defendants assert a lack of personal jurisdiction over Defendants Winkowski, Aguilar,  
23 and McAleenan; seek dismissal of all Defendants from all claims, based on qualified  
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25 <sup>1</sup> These Defendants were sued in both their official and individual capacities and  
26 bring this motion in their official capacities.

27 <sup>2</sup> David Aguilar, also a Supervisor Defendant, was sued in his individual capacity  
28 only and joins in this motion to dismiss in addition to all other Supervisor Defendants.  
The Supervisor Defendants sued in their individual capacities are Janet Napolitano,  
Thomas Winkowski, David Aguilar, Alan Bersin, Kevin McAleenan, Michael Fisher,  
Paul Beeson, Richard Barlow, and Rodney Scott.

1 immunity and failure to state a claim, except for the Fourth Amendment claim (Claim  
2 Five) against Agent Diaz; and seek dismissal of Plaintiffs' request for attorneys' fees  
3 as unrecoverable. On March 27, 2014, Plaintiffs filed their oppositions. (ECF Nos. 32,  
4 33). On April 17, 2014, Defendants filed their replies. (ECF Nos. 36, 37).

5 On March 27, 2014, Plaintiffs filed the pending Motion for Leave to Conduct  
6 Jurisdictional Discovery. (ECF No. 31). On May 1, 2014, Defendants Aguilar,  
7 McAleenan, and Winkowski filed an opposition. (ECF No. 39). On May 8, 2014,  
8 Plaintiffs filed a reply. (ECF No. 40).

9 On April 10, 2014, Plaintiffs, the Government Defendants, and the Supervisor  
10 Defendants sued in their official capacities filed a Joint Motion to Dismiss. (ECF No.  
11 34). The motion stipulated to dismissal with prejudice of the Government Defendants  
12 and Supervisor Defendants in their official capacities from all claims but Plaintiffs'  
13 First Claim, and Plaintiffs' Eighth Claim. On April 15, 2014, the Court granted the  
14 Joint Motion to Dismiss.<sup>3</sup> (ECF No. 35). Plaintiffs' Second, Fourth, and Sixth Claims  
15 are asserted against the Supervisor Defendants in their individual capacities.

## 16 **II. Allegations of the FAC**

### 17 **A. The Shooting**

18 On June 21, 2011, Yañez and Jose Ibarra-Murrieta ("Murrieta") "crossed the  
19 border from Mexico to the United States together." (ECF No. 25 at 10). With Murrieta  
20 in the lead, the two crossed the primary border fence, where Murrieta encountered  
21 United States Border Patrol Agent Nelson. "Upon seeing Agent Nelson, Murrieta leapt  
22 back into the culvert and began scaling a pole up the side of Stuart's Bridge." *Id.* at 11.  
23 United States Border Patrol Agent Diaz cut off Murrieta's escape, and Murrieta  
24 "descended back into the culvert where Agent Nelson waited." *Id.* Murrieta initially  
25 evaded Agent Nelson, but while he was being chased, he "tripped and fell to the  
26 ground" and "Agent Nelson grabbed him by the neck in an attempt to subdue him." *Id.*

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28 <sup>3</sup> The April 15, 2014 order omitted the Department of Homeland Security from  
the list of Government Defendants dismissed from Plaintiff's Second, Fourth, and Sixth  
Claims.

1 “Yañez, who had stayed in the culvert near the primary fence, escaped back to Mexico  
2 through the small hole in the fence.” *Id.* “Yañez climbed into a tree that leaned against  
3 the southern side of the primary fence near the area where Agent Nelson and Murrieta  
4 were grappling in the road.” *Id.* at 12. While attempting to subdue Murrieta, Agent  
5 Nelson “admittedly began to strike Murrieta while pinning him to the ground.” *Id.* at  
6 11.

7 From this point forward, the FAC recounts both the Agents’ and Murrieta’s  
8 versions of the events. According to Agent Nelson and Agent Diaz, while Agent  
9 Nelson and Murrieta were struggling, Yañez then “threw two rocks (per Agent Nelson)  
10 or one or possibly two rocks (per Agent Diaz) at Agent Nelson.” *Id.* at 12. “The  
11 Agents admit that the rock(s) was somewhere between the size of a golf ball and a  
12 baseball.” *Id.* Yañez then threw a “nail-studded board that struck Agent Nelson in the  
13 head, glancing off his hat.” *Id.* At this time, “Diaz arrived to help subdue Murrieta.  
14 Agent Diaz allegedly told Yañez to get off the fence, and then began helping Agent  
15 Nelson get control of Murrieta.” *Id.* “Agent Nelson acknowledges that then, without  
16 any warning and any further alleged throwing of a rock or board by Yañez, Agent  
17 Nelson pulled away from the scuffle with Murrieta. Agent Diaz removed his sidearm  
18 from its holster, uttered not a single additional word, and shot Yañez in the head.” *Id.*

19 Murrieta’s version of events “differs markedly.” *Id.* at 13. According to  
20 Murrieta, Yañez “never threw anything at Nelson or anyone else.” *Id.* at 14. “Instead,  
21 both Agent Nelson and Agent Diaz had Murrieta on the ground and were beating him.  
22 Agents Nelson and Diaz easily outweighed and outmuscled the slight-framed Murrieta,  
23 who was facedown in the dirt road.” *Id.* “In an apparent attempt to stop the attack,  
24 Yañez yelled that he was going to use his cellphone to take video and pictures of the  
25 beating. Upon hearing Yañez’s threat to record the Agents’ attack on Murrieta, Agent  
26 Diaz stopped beating Murrieta, stood up, and, without warning or provocation, shot  
27 Yañez in the head.” *Id.* at 14.

28 “Whichever of these two versions of the shoot the jury believes, the Agents

1 unlawfully used excessive, lethal force against Yañez.” *Id.*

2 **B. The Rocking Policy**

3 The shooting of Yañez was not a “spontaneous act,” but an action taken pursuant  
4 to the “Rocking Policy,” a policy with the “imprimatur of the highest-ranking DHS  
5 officials.” *Id.* at 15, 16. “Pursuant to this unlawful Rocking Policy, Border Patrol  
6 agents along the southern border regularly use excessive, lethal force against persons  
7 of perceived Hispanic descent and Mexican nationality.” *Id.* The Supervisor  
8 Defendants, which include high ranking DHS officials, such as Janet Napolitano,  
9 Secretary of DHS, and local Border Patrol supervisory personnel, such as Rodney Scott,  
10 the Acting Deputy Chief Patrol Agent of the Border Patrol’s San Diego Sector, “knew,  
11 or reasonably should have known, that Border Patrol agents along the southern border  
12 ... had a regular pattern and practice of implementing a Rocking Policy pursuant to  
13 which agents deemed others’ throwing of rocks at them to be per se lethal force that  
14 justifies the agents’ shooting to kill the alleged rock-throwers.” *Id.* at 16. “Despite  
15 repeated public statements by agents’ representatives that the Rocking Policy is lawful  
16 and appropriate, and despite the evidence (including video evidence) of agents’ regular  
17 use of excessive, lethal force along the southern border, none of the Government  
18 Defendants or Supervisor Defendants objected to or demanded a stop to such unlawful  
19 force.” *Id.* at 27. “For example, on June 9, 2010, the National Border Patrol Council  
20 of the American Federation of Government Employees (‘NBPC’) issued a nationwide  
21 press release that succinctly stated the Rocking Policy.” *Id.* at 17. The FAC identifies  
22 fourteen instances of Border Patrol agents killing persons at the border in response to  
23 alleged rock throwing. In one instance, at the border near El Paso, the Department of  
24 Justice and the president of the NBPC concluded that the shooting of a Mexican  
25 teenager was justified. Although the teenager was allegedly throwing rocks at Border  
26 Patrol agents, the allegation was proven to be untrue by three videos of the event.

27 In addition, the Government and Supervisor Defendants have shown “consistent  
28 disregard of complaints regarding the Rocking Policy.” *Id.* at 22. The FAC alleges ten

1 instances where “national and international organizations have condemned the Border  
2 Patrol’s routine use of excessive, lethal force along the southern border.” *Id.* For  
3 example, according to the Huffington Post, the Mexican Attorney General told  
4 Defendant Napolitano that an alleged border shooting of a Mexican national in response  
5 to rock throwing was an “unjustified use of force against our population.” (ECF Nos.  
6 25 at 25, 32-1 at 152). Additionally,

7 [t]he DHS commissioned the Police Executive Research Forum (‘PERF’)  
8 to provide expert, objective guidance to DHS and CBP regarding the use  
9 of lethal force in response to alleged rock-throwing . . . PERF carefully  
10 studied the issue and submitted a report to DHS and CBP advising that the  
11 Rocking Policy is unlawful and that those agencies should no longer  
12 permit agents to treat the throwing of rocks at them as per se deadly force  
to which they can respond with lethal gunfire. On November 5, 2013,  
Defendant Fisher announced that the agencies had decided to reject the  
expert, objective recommendation that they had commissioned PERF to  
provide, and instead to reaffirm yet again the unlawful Rocking Policy.

13 (ECF No. 25 at 26-27).

14 Finally, the Government and Supervisor Defendants “have knowingly failed to  
15 provide for adequate training of Border Patrol agents concerning the proper use of  
16 force” by failing “to ensure that the agents knew that the Rocking Policy is unlawful  
17 under international and domestic law.” *Id.* at 27. They have also “failed to take timely  
18 and effective measures to prohibit, prevent, and punish such practices and to punish or  
19 discipline the perpetrators and responsible commanders.” *Id.* at 28.

20 The FAC asserts the following claims for relief: (1) violation of the law of  
21 nations against the Government Defendants; (2) violation of the Fifth Amendment Due  
22 Process Clause against the Government Defendants and Supervisor Defendants; (3)  
23 violation of the Fifth Amendment Due Process Clause against the Agent Defendants;  
24 (4) violation of the Fourth Amendment’s prohibition against unreasonable seizures  
25 against the Government Defendants and Supervisor Defendants; (5) violation of the  
26 Fourth Amendment’s prohibition against unreasonable seizures against the Agent  
27 Defendants; (6) violation of the Fifth Amendment’s Equal Protection Clause against the  
28 Government Defendants and Supervisor Defendants; (7) violation of the Fifth



1 Amendment's Equal Protection Clause against the Agent Defendants; and (8)  
 2 Declaratory Relief regarding the judgment bar provision of the Federal Tort Claims Act  
 3 ("FTCA").

4 **III. The Government and Supervisor Defendants' Motion to Dismiss (ECF No. 26)**  
 5 **Based on Sovereign Immunity**

6 Subsequent to the Court's April 15, 2014 Order granting the Joint Motion to  
 7 Dismiss (ECF No. 35), the only pending issues in the Government Defendants' and  
 8 Supervisor Defendants' Motion to Dismiss (ECF No. 26) are whether Plaintiffs' First  
 9 Claim for violation of the law of nations is barred by sovereign immunity, and whether  
 10 Plaintiffs' prayer for attorneys' fees should be dismissed as unrecoverable.

11 The Government Defendants contend that Plaintiffs' First Claim for violation of  
 12 the law of nations cannot be maintained against the United States or its agencies  
 13 because the United States has not waived its sovereign immunity for violations of  
 14 international law. (ECF No. 26-1 at 11-16). Specifically, the Government Defendants  
 15 contend that neither Alien Tort Statute ("ATS") nor any treaty or international  
 16 declaration provides the explicit Congressional waiver required to effectively waive  
 17 sovereign immunity. *Id.* at 11-15 The Government Defendants also contend that the  
 18 Federal Tort Claims Act's ("FTCA") limited waiver of sovereign immunity does not  
 19 apply to international-law based claims. *Id.* at 15-16.

20 Plaintiffs assert that the alleged shooting amounted to an extra-judicial killing,  
 21 a *jus cogens*<sup>4</sup> violation of international law. (ECF No. 33 at 17-18). Plaintiffs contend  
 22 that the United States and its agencies are "a fortiori" deprived of sovereign immunity  
 23 for *jus cogens* violations because foreign officials and governments are not protected  
 24 by foreign sovereign immunity under the ATS for *jus cogens* violations. *Id.* at 17-20.

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 26 <sup>4</sup> "As defined in the Vienna Convention on the Law of Treaties, a *jus cogens*  
 27 norm, also known as a 'peremptory norm' of international law, 'is a norm accepted and  
 28 recognized by the international community of states as a whole as a norm from which  
 no derogation is permitted and which can be modified only by a subsequent norm of  
 general international law having the same character.'" *Siderman de Blake v. Republic  
 of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (citing Vienna Convention on the Law  
 of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679).

1 Plaintiffs rely on *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004) for the propositions  
 2 that: (1) violations of “specific, universal, and obligatory” international norms are  
 3 actionable under the ATS; and (2) the very purpose of the ATS was to permit suits by  
 4 non-U.S. citizens against U.S. officials acting in their official capacity, such that “no  
 5 additional Congressional waiver of sovereign immunity was required.” *Id.* at 20-26.  
 6 Finally, Plaintiffs contend that sovereign immunity for an extrajudicial killing would  
 7 be contrary to international law, citing Restatement (Third) of Foreign Relations Law  
 8 § 711(a) (1987) and the European Convention of Human Rights, and the United States’  
 9 own international obligations, citing the American Convention on Human Rights. *Id.*  
 10 at 26-30. Plaintiffs contend that the *Charming Betsy* canon should be applied, that is,  
 11 “the Court should not construe the ATS to conflict with international law absent an  
 12 ‘affirmative expression of congressional intent,’” by considering these international  
 13 mandates. *Id.* at 31 (citing *Heong v. United States*, 112 U.S. 536, 540 (1884)).

14 The United States, as a sovereign, is immune from suit. *United States v. Mitchell*,  
 15 445 U.S. 535, 538 (1980). “It is axiomatic that Congressional waiver of sovereign  
 16 immunity is a prerequisite to any suit brought against the United States.” *Roberts*  
 17 *v. United States*, 498 F.2d 520, 525 (9th Cir. 1974). The United States “may not be sued  
 18 without its consent and the terms of such consent define the court’s jurisdiction.” *Baker*  
 19 *v. United States*, 817 F.2d 560, 562 (9th Cir. 1987). A waiver of sovereign immunity  
 20 as contained in any statute “will be strictly construed, in terms of its scope, in favor of  
 21 the sovereign.” *Lane v. Pena*, 518 U.S. 187, 192 (1996). “A party bringing a cause of  
 22 action against the federal government bears the burden of showing an unequivocal  
 23 waiver of immunity.” *Baker*, 817 F.2d at 562. A waiver of the sovereign immunity of  
 24 the United States must be “unequivocally expressed.” *Franconia Assoc. v. United*  
 25 *States*, 536 U.S. 129, 141 (2002).

26 The ATS provides that “[t]he district courts shall have original jurisdiction of any  
 27 civil action by an alien for a tort only, committed in violation of the law of nations or  
 28 a treaty of the United States.” 28 U.S.C. § 1350. The “[ATS] has been interpreted as



1 a jurisdiction statute only—it has not been held to imply any waiver of sovereign  
2 immunity.” *Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011) (quoting  
3 *Goldstar (Panama) S.A. v. United States*, 967 F.2d 956, 968 (4th Cir. 1992)); *see also*  
4 *Koohi v. United States*, 976 F.2d 1328, 1333 n.4 (9th Cir. 1992); *Industria Panificadora*  
5 *S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir. 1992). Therefore, “any party  
6 asserting jurisdiction under the [ATS] must establish, independent of that statute, that  
7 the United States has consented to suit.” *Tobar*, 639 F.3d at 1196.

8 The United States has not unequivocally expressed its consent to suit pursuant  
9 to the ATS. Controlling case law in this Circuit holds that the ATS does not waive  
10 sovereign immunity. *Tobar*, 639 F.3d at 1196. *Sosa v. Alvarez-Machain*, 542 U.S. 692  
11 (2004) does not hold otherwise. In *Sosa*, the plaintiff, a Mexican physician, sued  
12 another Mexican national for abducting him and bringing him to the United States for  
13 his arrest. *Id.* at 698. The Supreme Court interpreted the ATS to permit private causes  
14 of action for a select few torts in violation of the law of nations that were “defined with  
15 a specificity comparable to the features of the 18th-century paradigms” of “violation of  
16 safe conducts, infringement of the rights of ambassadors, and piracy.” *Id.* at 724-25.  
17 *Sosa* does not address whether the United States may be sued pursuant to the ATS and  
18 does not hold that sovereign immunity is waived for a violation of the law of nations.

19 Plaintiffs have not established, “independent of [the ATS], that the United States  
20 has consented to suit.” *Tobar*, 639 F.3d at 1196. The two treaties Plaintiffs rely on do  
21 not waive sovereign immunity. The American Convention on Human Rights has not  
22 been ratified. The International Covenant on Civil and Political Rights has been ratified  
23 by the Senate, “[b]ut that treaty is not self-executing and therefore ‘did not itself create  
24 obligations enforceable in the federal courts.’” *Tobar*, 639 F.3d at 1196 (citing *Sosa*,  
25 542 U.S. at 735).

26 The Court further concludes that the alleged *jus cogens* violation by the  
27 Government and Supervisor Defendants does not result in a waiver of, or exception to,  
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1 sovereign immunity. The waiver must be “unequivocally expressed.” *Franconia*  
2 *Assoc.*, 536 U.S. at 141. In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699  
3 (1992), the Ninth Circuit recognized that a foreign state could lose its *foreign* immunity  
4 for committing a *jus cogens* violation because *jus cogens* norms have the “highest status  
5 under international law,” and the principle of foreign sovereign immunity is itself a  
6 principle of international law. *Id.* at 717-18. However, Plaintiffs have cited no  
7 authority for the proposition that alleging a *jus cogens* violation waives the *domestic*  
8 sovereign immunity of the United States, a principle firmly rooted in *domestic law*.

9 Finally, the Court cannot apply the *Charming Betsy* canon, which provides that  
10 “an act of Congress ought never to be construed to violate the law of nations if any  
11 other possible construction remains,” *Murray v. Schooner Charming Betsy*, 6 U.S. 64,  
12 118 (1804), to conclude that the ATS waives sovereign immunity for *jus cogens*  
13 violations. First, although a *jus cogens* violation is a violation of the law of nations,  
14 *Siderman de Blake*, 965 F.2d at 714, no authority requires a waiver of sovereign  
15 immunity to remedy that *jus cogens* violation. The international law sources cited by  
16 Plaintiffs stand for the general proposition that violations of international law  
17 committed by a state or its officials must be remedied by that state, but they do not  
18 require that a state consent to being sued directly. In this case, Plaintiffs are not  
19 precluded by the doctrine of sovereign immunity from suing the Agent or Supervisor  
20 Defendants in their individual capacities.

21 Second, “the Supreme Court has never invoked *Charming Betsy* against the  
22 United States in a suit in which it was a party.” *United States v. Corey*, 232 F.3d 1166,  
23 1179 (9th Cir. 2000). “The concerns that underlie the canon are ‘obviously much less  
24 serious where the interpretation arguably violating international law is urged upon [the  
25 court] by the Executive Branch of our government.’ When the Executive Branch is the  
26 party advancing a construction of a statute with potential foreign policy implications,  
27 we presume that ‘the President has evaluated the foreign policy consequences of such  
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1 an exercise of U.S. law and determined that it serves the interests of the United States.’’  
 2 *ARC Ecology v. U.S. Dept. Of Air Force*, 411 F.3d 1092, 1102 (9th Cir. 2005) (citing  
 3 *Corey*, 232 F.3d at 1179); *see also Serra v. Lappin*, 600 F.3d 1191, 1200 (9th Cir. 2010)  
 4 (holding that because ‘‘Congress is not constrained by international law as it is by the  
 5 Constitution . . . ‘we are bound by a properly enacted statute, provided it be  
 6 constitutional, even if that statute violates international law.’’’) (citing *Alvarez-Mendez*  
 7 *v. Stock*, 941 F.2d 956, 963 (9th Cir. 1991)).

8 Because Plaintiffs’ First Claim is only asserted against the Government  
 9 Defendants, Plaintiffs fail to state a claim for ‘‘violation of the law of nations.’’ *See*  
 10 *Balser v. Department of Justice, Office of U.S. Trustee*, 327 F.3d 903, 907 (9th Cir.  
 11 2003) (‘‘In sovereign immunity analysis, any lawsuit against an agency of the United  
 12 States or against an officer of the United States in his or her official capacity is  
 13 considered an action against the United States.’’). Plaintiffs’ First Claim is dismissed.

#### 14 **IV. The Supervisor and Agent Defendants’ Motion to Dismiss (ECF No. 27)**

15 Defendants Winkowski, Aguilar, and McAleenan move to dismiss the FAC for  
 16 lack of personal jurisdiction. The Supervisor Defendants and Agent Nelson move to  
 17 dismiss all claims asserted against them for failure to statute a claim and based on  
 18 qualified immunity. The Supervisor Defendants and Agent Defendants move to dismiss  
 19 Plaintiffs’ request for attorneys’ fees.

##### 20 **A. Personal Jurisdiction and Plaintiffs’ Motion for Leave to Conduct** 21 **Jurisdictional Discovery (ECF No. 31)**

22 Plaintiffs allege that Winkowski, Aguilar, and McAleenan were, at the time of  
 23 Yañez’s death, the Assistant Commissioner of CBP in the Office of Field Operations,  
 24 the Acting Deputy Commissioner of CBP, and Deputy Assistant Commissioner of CBP  
 25 in the Office of Field Operations, respectively. Plaintiffs generally allege that each of  
 26 these defendants was responsible for implementing and approving of the Rocking  
 27 Policy responsible for Yañez’s death, and each were responsible for knowing about the  
 28

1 Rocking Policy but failing to put a stop to it.

2 Defendants assert that Plaintiffs have made no attempt to connect these  
3 Defendants' activities to the State of California. Plaintiffs assert that they have made  
4 a prima facie showing of specific jurisdiction by alleging that each Defendant was  
5 responsible for training Border Patrol agents and was "responsible for approving and  
6 implementing the . . . Rocking Policy." (ECF No. 25 at 5-6). Plaintiffs also submit  
7 various exhibits in order to demonstrate each Defendant's contact with California and  
8 request leave to conduct jurisdictional discovery.

9 **i. 12(b)(2) Standard**

10 On a motion to dismiss a complaint for lack of personal jurisdiction, the plaintiff  
11 bears the burden of establishing personal jurisdiction. *Farmers Ins. Exch. v. Portage*  
12 *La Prarie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990). Where the motion to  
13 dismiss is based on written materials rather than an evidentiary hearing, the plaintiff  
14 need only make a prima facie showing of jurisdictional facts to satisfy this burden.  
15 *Dole Food Co. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002). While the plaintiff  
16 cannot "simply rest on the bare allegations of its complaint," *Amba Mktg. Sys., Inc. v.*  
17 *Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977), uncontroverted allegations in the  
18 complaint must be taken as true. *AT&T v. Campagnie Bruxelles Lambert*, 94 F.3d 586,  
19 588 (9th Cir. 1996). Conflicts between parties over statements contained in affidavits  
20 must be resolved in the plaintiff's favor. *Id.*; see also *Bancroft & Masters, Inc. v.*  
21 *Augusta Nat'l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) ("Because the prima facie  
22 jurisdictional analysis requires us to accept the plaintiff's allegations as true, we must  
23 adopt [the plaintiff's] version of events for purposes of this appeal."). "[I]f a plaintiff's  
24 proof is limited to written materials, it is necessary only for these materials to  
25 demonstrate facts which support a finding of jurisdiction in order to avoid a motion to  
26 dismiss." *Data Disc, Inc. v. Sys. Tech. Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir.  
27 1977).

1 The exercise of personal jurisdiction over a nonresident defendant must be  
 2 authorized under the state’s long-arm statute and must satisfy the due process clause of  
 3 the United States Constitution. *Pac. Atl. Trading Co. v. M/V Main Express*, 758 F.2d  
 4 1325, 1327 (9th Cir. 1985). California’s long-arm statute permits the exercise of  
 5 personal jurisdiction “on any basis not inconsistent with the Constitution of this state  
 6 or the United States.” Cal. Code Civ. Proc. § 410.10. Due process requires that the  
 7 defendant have such “minimum contacts” with the forum state that the exercise of  
 8 jurisdiction over the defendant does not offend “traditional notions of fair play and  
 9 substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1954). Under  
 10 due process analysis, a defendant may be subject to either general or specific personal  
 11 jurisdiction. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414  
 12 (1984).

### 13 **ii. General Jurisdiction**

14 To exercise general jurisdiction over a non-resident defendant, the defendant  
 15 must engage in “continuous and systematic” contacts that “approximate physical  
 16 presence in the forum state.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797,  
 17 801 (9th Cir. 2004) (citations and internal quotations omitted).

18 Plaintiffs have failed to establish general personal jurisdiction over Defendants  
 19 Winkowski, Aguilar, or McAleenan. Plaintiffs have failed to make a prima facie  
 20 showing that any of these defendants reside in California or have ongoing activities in  
 21 California.

### 22 **iii. Specific Jurisdiction**

23 The Ninth Circuit analyzes specific jurisdiction according to a three-prong test:

24 (1) The non-resident defendant must purposefully direct his activities or  
 25 consummate some transaction with the forum or resident thereof; or  
 26 perform some act by which he purposefully avails himself of the privilege  
 of conducting activities in the forum, thereby invoking the benefits and  
 protections of its laws;

27 (2) the claim must be one which arises out of or relates to the defendant’s  
 forum-related activities; and

28 (3) the exercise of jurisdiction must comport with fair play and substantial

1 justice, i.e. it must be reasonable.

2 *Menken v. Emm*, 503 F.3d 1050, 1057 (9th Cir. 2007). Purposeful direction requires  
 3 that the defendant allegedly must have (1) committed an intentional act, (2) expressly  
 4 aimed at the forum state, (3) causing harm that the defendant knows is likely to be  
 5 suffered in the forum state. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et*  
 6 *L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006).

7 Plaintiffs have not made a prima facie showing that Defendants Winkowski,  
 8 Aguilar, or McAleenan are subject to specific personal jurisdiction in California.  
 9 Plaintiffs allege, in introducing Winkowski, Aguilar, and McAleenan, that they were  
 10 responsible for implementing a Rocking Policy at the Southern Border. However, the  
 11 factual allegations of the FAC state that these defendants were responsible for failing  
 12 to put a stop to the Rocking Policy after they became aware of it. The FAC's general  
 13 allegations of these federal officers' supervisory responsibilities and alleged  
 14 implementation of the Rocking Policy, without more, do not satisfy Plaintiffs' prima  
 15 facie burden to satisfy the purposeful direction test. *See Menken*, 503 F.3d at 1057; *see*  
 16 *also Hill v. Pugh*, 75 Fed. App'x 715, 719 (10th Cir. 2003) (unpublished) (holding that  
 17 the allegation that two high-ranking Federal Bureau of Prisons officials "have overall  
 18 responsibility for Bureau of Prisons' operations in Colorado" was insufficient to satisfy  
 19 the purposeful availment test); *Munns v. Clinton*, 822 F. Supp. 2d 1048, 1078 (E.D. Cal.  
 20 2011) ("[A]llegations limited to national policy implementation and oversight are  
 21 insufficient to support a finding of personal jurisdiction because a contrary finding  
 22 would essentially subject the [high-ranking State Department officials] to personal  
 23 liability in every state in the Union regardless of how tenuous their actual contacts with  
 24 a particular forum might be."). Additionally, these federal officers' alleged  
 25 omissions—failures to train, supervise, and prevent or correct the use of the Rocking  
 26 Policy—are not "intentional act[s] ... expressly aimed at the forum state." *Yahoo!*, 433  
 27 F.3d at 1206.

#### 28 **iv. Leave to Conduct Jurisdictional Discovery**



1 A district court has discretion to permit or deny jurisdictional discovery.  
 2 *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). “Discovery may be  
 3 appropriately granted where pertinent facts bearing on the question of jurisdiction are  
 4 controverted or where a more satisfactory showing of the facts is necessary.” *Id.* A  
 5 district court may deny jurisdictional discovery “[w]here a plaintiff’s claim of personal  
 6 jurisdiction appears to be both attenuated and based on bare allegations in the face of  
 7 specific denials made by the defendants . . . .” *Pebble Beach Co. v. Caddy*, 453 F.3d  
 8 1151, 1160 (9th Cir. 2006) (quotation omitted).

9 The Court finds that jurisdictional discovery is inappropriate at this time.  
 10 Because neither the allegations of the FAC nor the evidence of Defendant Winkowski,  
 11 Aguilar, and McAleenan’s past activities in California make a prima facie showing of  
 12 a “continuous and systematic” presence, it is wholly speculative that discovery will lead  
 13 to evidence necessary to establish *general* jurisdiction. *Boschetto*, 539 F.3d at 1020  
 14 (“The denial of [the plaintiff’s] request for discovery, which was based on little more  
 15 than a hunch that it might yield jurisdictionally relevant facts, was not an abuse of  
 16 discretion.”). Whether the Court may exercise *specific* jurisdiction over these  
 17 Defendants will depend on whether Plaintiffs can allege forum-related activity giving  
 18 rise to their claims. Jurisdictional discovery is not necessary to accomplish this task.

#### 19 **v. Conclusion**

20 The Motion to Dismiss Defendants Winkowski, Aguilar, and McAleenan for lack  
 21 of personal jurisdiction (ECF No. 27) is granted. The Motion for Leave to Conduct  
 22 Jurisdictional Discovery (ECF No. 31) is denied.

#### 23 **B. Failure to State a Claim and Qualified Immunity**

24 Defendants contend that all Defendants are entitled to qualified immunity on all  
 25 of Plaintiffs’ Claims except for Plaintiffs’ Fourth Amendment Claim against Agent  
 26 Diaz. Specifically, Defendants contend that Plaintiffs have failed to allege sufficient  
 27 facts to establish supervisory liability against any Supervisor Defendant, Plaintiffs have  
 28 failed to allege a viable secondary liability theory against Agent Nelson, and Plaintiffs

1 have failed to allege the violation of clearly established rights under the Due Process  
2 and Equal Protection Clauses.

3 **i. 12(b)(6) Standard**

4 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state  
5 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “A pleading that  
6 states a claim for relief must contain ... a short and plain statement of the claim showing  
7 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Dismissal under Rule  
8 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient  
9 facts to support a cognizable legal theory. *See Balistreri v. Pac. Police Dep’t*, 901 F.2d  
10 696, 699 (9th Cir. 1990).

11 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’  
12 requires more than labels and conclusions, and a formulaic recitation of the elements  
13 of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)  
14 (quoting Fed. R. Civ. P. 8(a)(2)). When considering a motion to dismiss, a court must  
15 accept as true all “well-pleaded factual allegations.” *Ashcroft v. Iqbal*, 556 U.S. 662,  
16 679 (2009). However, a court is not “required to accept as true allegations that are  
17 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”  
18 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “In sum, for a  
19 complaint to survive a motion to dismiss, the non-conclusory factual content, and  
20 reasonable inferences from that content, must be plausibly suggestive of a claim  
21 entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.  
22 2009) (quotations omitted).

23 Where government officials are sued in their individual capacities for civil  
24 damages, a court must “begin by taking note of the elements a plaintiff must plead to  
25 state a claim . . . against officials entitled to assert the defense of qualified immunity.”  
26 *Iqbal*, 556 U.S. at 675. Government officials are entitled to qualified immunity unless  
27 the plaintiff can allege the violation of a “clearly established” constitutional right.  
28 *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

**ii. Fourth Amendment Unreasonable Seizure (Fourth and Fifth Claims)**

**a. Supervisor Defendants (Fourth Claim)**

Plaintiffs' Fourth Claim is brought against the Supervisor Defendants in their individual capacities. Plaintiffs allege that each and every Supervisor Defendant violated Yañez's Fourth Amendment rights by "personally developing, authorizing, and conspiring to effect, and permitting and directing their subordinates to implement, the Rocking Policy" and by "failing to establish adequate procedures to train the Border patrol agents, failing to establish adequate disciplinary procedures and adequate procedures to investigate agents' misconduct, and acting and failing to act in disregard of previous allegations of Border Patrol agents' use of excessive, lethal force." (ECF No. 25 at 44).

Defendants contend that Plaintiffs cannot maintain suit against the Supervisor Defendants by alleging their knowledge and acquiescence to the alleged unconstitutional conduct. Defendants assert that Plaintiffs have failed to allege the specific roles of each Defendant beyond their general responsibilities within DHS, such as how each became aware of the Rocking Policy.

Plaintiffs contend that allegations of "deliberate indifference" or "knowledge and acquiescence" are sufficient to state *Bivens* violations. (ECF No. 32 at 17). Plaintiffs assert that all of the public information alleged in the FAC reasonably gives rise to the inference that each Supervisor Defendant was aware of the Rocking Policy, and that they have alleged the specific knowledge of Defendants Napolitano and Fisher.

"A defendant may be held liable as a supervisor under § 1983 [or *Bivens*] 'if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'" *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (citing *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989)); *see also id.* at 1206-08 (explaining that "a *Bivens* action is the federal analog to an action against state or local officials

1 under § 1983"). "A supervisor can be liable in his individual capacity for his own  
 2 culpable action or inaction in the training, supervision, or control of his subordinates;  
 3 for his acquiescence in the constitutional deprivation; or for conduct that showed a  
 4 reckless or callous indifference to the rights of others." *Watkins v. City of Oakland*, 145  
 5 F.3d 1087, 1093 (9th Cir. 1998). For a Fourth Amendment claim premised on  
 6 supervisory liability, a plaintiff must allege facts demonstrating that a reasonable  
 7 supervisor in the defendant's shoes would have found his own conduct to be "clearly  
 8 unlawful." *Chavez v. U.S.*, 683 F.3d 1102, 1110 (9th Cir. 2012).

9 Plaintiffs' allegations of each Supervisor Defendant's supervisory institutional  
 10 role do not, without more, permit an inference of knowledge of the Rocking Policy. *See*  
 11 *Moss v. U.S. Secret Serv.*, 711 F.3d 941, 968 (9th Cir. 2012), *rev'd on other grounds*  
 12 *sub nom. Wood v. Moss*, 134 S. Ct. 2056 (2014) (holding that the allegation that the  
 13 "Superintendent of the Oregon State Police" was "responsible for directing the  
 14 operations of the Oregon State Police and supervising law enforcement officers" was  
 15 insufficient to state a claim for supervisory liability); *Chavez*, 683 F.3d at 1110-11  
 16 (holding that allegations of supervisory roles are insufficient to infer supervisor's  
 17 knowledge of the allegedly unconstitutional activities of subordinates). Plaintiffs have  
 18 alleged in detail several instances of border shootings related to alleged rock throwing  
 19 and detailed public debate on the Border Patrol's use of lethal force in response to rock  
 20 throwing, including statements by the NBPC. These allegations make it possible that  
 21 some or all of the Supervisor Defendants were aware of the alleged Rocking Policy, but  
 22 "the non-specific allegations in the complaint regarding [each Supervisor Defendant's  
 23 individual involvement] fail to nudge the *possible* to the *plausible*, as required by  
 24 *Twombly*." *al-Kidd v. Ashcroft*, 580 F.3d 949, 979 (2009), *rev'd on other grounds*, 131  
 25 S. Ct. 2074 (2011); *see also Hydrick v. Hunter*, 669 F.3d 937, 942 (2012) (complaint  
 26 must allege facts demonstrating that each supervisor was personally responsible for the  
 27 alleged constitutional violation).

28 Plaintiffs only make specific factual allegations as to Defendants Napolitano and

1 Fisher. As to Defendant Napolitano, the report that the Mexican Attorney General  
 2 complained to her of excessive force used in one instance is not sufficient to plausibly  
 3 put her on notice of the alleged Rocking Policy.<sup>5</sup> *al-Kidd*, 580 F.3d at 979. This  
 4 allegation alone is insufficient to state a claim against Defendant Napolitano on a  
 5 supervisory liability theory.

6 As to Defendant Fisher, the article incorporated by reference in the FAC begins  
 7 by reporting that “Border Patrol agents will be allowed to continue using deadly force  
 8 against rock-throwers, [Defendant Fisher] said, despite the recommendation of a  
 9 government-commissioned review to end the practice.” *Associated Press Exclusive:*  
 10 *Border Patrol Rejects Curbs on Force* (November 5, 2013), available at  
 11 <http://bigstory.ap.org/article/ap-exclusive-border-patrol-rejects-curbs-force>. The  
 12 incorporated article permits the inference that Defendant Fisher knew of and was  
 13 responsible for the alleged Rocking Policy. Although the article post-dates Yañez’s  
 14 death, Plaintiffs have alleged that Defendant Fisher has served as the Chief of the  
 15 Border Patrol since May 2010, and have set forth facts to permit the inference that the  
 16 alleged Rocking Policy existed for the entirety of Defendant Fisher’s tenure. This  
 17 individualized factual allegation is sufficient to state a claim against Defendant Fisher.

18 The Court concludes that Plaintiffs have failed to allege sufficient facts to state  
 19 a Fourth Amendment claim against all Defendants except Fisher. The Motion to  
 20 Dismiss the Fourth Claim as to Defendant Fisher is denied. The Motion to Dismiss the  
 21 Fourth Claim as to all other Supervisor Defendants is granted.

#### 22 **b. Agent Nelson (Fifth Claim)**

23 The FAC alleges that:

24 According to Agent Nelson, at about the time that Yañez allegedly threw  
 25

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26 <sup>5</sup> The article incorporated by reference states that, in response to the shooting of a  
 27 Mexican teenager near El Paso, “[Mexican] Attorney General Fernando Gomez Mont told  
 28 Homeland Security head Janet Napolitano that ‘the unjustified use of force against our  
 population is unacceptable to the Mexican government.’” Laura Carlsen, *Lethal Force on the  
 Border*, *Huffington Post*, June 18, 2010, available at  
[http://www.huffingtonpost.com/laura-carlsen/lethal-force-on-the-borde\\_b\\_617065.html](http://www.huffingtonpost.com/laura-carlsen/lethal-force-on-the-borde_b_617065.html).

1 the board, Diaz arrived to help subdue Murrieta. Agent Diaz allegedly  
 2 told Yañez to get off the fence, and then began helping Agent Nelson get  
 3 control of Murrieta.... Agent Nelson acknowledges then, without any  
 4 warning and any further alleged throwing of a rock or a board by Yañez,  
 Agent Nelson pulled away from the scuffle with Murrieta. Agent Diaz  
 removed his sidearm from its holster, uttered not a single additional word,  
 and shot Yañez in the head.

5 (ECF No. 25 at 12). The FAC further alleges that, according to Murrieta:

6 [B]oth Agent Nelson and Agent Diaz had Murrieta down on the ground  
 7 and were beating him. Agents Nelson and Diaz easily outweighed and  
 8 outmuscled the slight-framed Murrieta, who was facedown in the dirt road.  
 9 In fact, when Murrieta was eventually taken away by a cadre of Border  
 10 Patrol agents, he was disoriented and his mouth was covered with his own  
 11 blood.... While Agents Nelson and Diaz had Murrieta on the ground and  
 12 were beating him, Yañez climbed into the tree on the south side of the  
 primary fence and tried to dissuade Agents Nelson and Diaz from  
 continuing the beating.... In an apparent effort to stop the attack, Yañez  
 13 yelled that he was going to use his cellphone to take video and pictures of  
 the beating. Upon hearing Yañez's threat to record the Agents' attack on  
 Murrieta, Agent Diaz stopped beating Murrieta, stood up, and, without  
 warning or provocation, shot Yañez in the head.

14 *Id.* at 14. Plaintiffs' Fifth Claim alleges, in pertinent part:

15 Agent Nelson is also liable for this constitutional violation because he  
 16 witnessed this illegal conduct but took no action to protect Yañez, ratified  
 Agent Diaz's illegal conduct after it had occurred, and/or conspired with  
 Agent Diaz to commit and/or cover-up this illegal conduct.... [t]he Agents  
 17 were aware of the danger and risk of serious harm or death that Yañez and  
 others faced as a result of their use of excessive force. The Agents  
 nevertheless personally took affirmative steps that created and/or increased  
 18 this danger and risk, which did, in fact, result in Yañez's death. Yañez's  
 death was a foreseeable result of the Agents' actions and omissions.

19 *Id.* at 44-45.

20 Agent Nelson contends that the FAC does not allege the violation of a clearly  
 21 established constitutional right based on a viable theory of secondary liability. Agent  
 22 Nelson asserts that Plaintiffs have not alleged sufficient facts plausibly demonstrating  
 23 a conspiracy between him and Agent Diaz. Agent Nelson also asserts that he could not  
 24 have provoked and therefore proximately caused the shooting of Yañez absent an  
 25 underlying constitutional violation. Finally, Agent Nelson asserts that there was not  
 26 enough time for him to intervene.

27 Plaintiffs assert that the FAC does allege that the Agents conspired to beat  
 28



1 Murrieta, and it was foreseeable to Nelson that Agent Diaz would shot Yañez in  
 2 furtherance of the conspiracy. Plaintiffs contend that the beating of Murrieta was  
 3 unconstitutional and that this “unconstitutional provocation is the proximate cause of  
 4 the subsequent application of deadly force” used on Yañez. (ECF No. 32 at 35).  
 5 Finally, Plaintiffs contend that the FAC is silent as to the amount of time that elapsed  
 6 between Agent Diaz leaving the scuffle with Murrieta and shooting Yañez.

### 7 **I. Conspiracy**

8 To establish defendants’ liability for conspiracy, “a plaintiff must demonstrate  
 9 the existence of an agreement or meeting of the minds to violate constitutional rights.”  
 10 *Mendocino Envtl. Ctr. v. Mendocino Cnty*, 192 F.3d 1283, 1301 (9th Cir. 1999) (citing  
 11 *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir.  
 12 1989)) (internal quotations omitted). “The defendants must have, by some concerted  
 13 action, intend[ed] to accomplish some unlawful objective for the purpose of harming  
 14 another which results in damage.” *Id.* (citing *Gilbrook v. City of Westminster*, 177 F.3d  
 15 839, 856 (9th Cir. 1999)). “Direct evidence of improper motive or an agreement among  
 16 the parties to violate a plaintiff’s constitutional rights will only be rarely available.  
 17 Instead, it will almost always be necessary to infer such agreements from circumstantial  
 18 evidence or the existence of joint action.” *Id.* at 1302. “To be liable, each participant  
 19 in the conspiracy need not know the exact details of the plan, but each participant must  
 20 at least share the common objective of the conspiracy.” *United Steelworkers of Am.*,  
 21 865 F.2d at 1541. To establish that the conspiracy was the cause of the plaintiff’s  
 22 injuries, “the requisite causal chain can occur through the ‘setting in motion [of] a series  
 23 of acts by others which the actor knows or reasonably should know would cause others  
 24 to inflict the constitutional injury.’” *Harris v. Roderick*, 126 F.3d 1189, 1196 (9th Cir.  
 25 1997) (citing *Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978)).

26 Although the FAC alleges that Agent Nelson “conspired with Agent Diaz to  
 27 commit and/or cover-up this illegal conduct,” (ECF No. 25 at 45), the FAC does not  
 28 specify what “illegal conduct” the agents conspired to commit. It therefore fails to state

1 a crucial element of a conspiracy claim and fails to put Defendants on notice of what  
2 wrongdoing the claim is premised on. *See Jones v. Cmty. Redevelopment Agency of Los*  
3 *Angeles*, 733 F.2d 646,649 (9th Cir. 1984) (“[A] pleading must give[ ] fair notice and  
4 state[ ] the elements of the claim plainly and succinctly.”) (internal quotations omitted).  
5 The FAC fails to state a Fourth Amendment claim against Agent Nelson for conspiring  
6 to violate Yañez’s Fourth Amendment rights.

## 7 **II. Unconstitutional Provocation**

8 “[W]here an officer intentionally or recklessly provokes a violent confrontation,  
9 if the provocation is an independent Fourth Amendment violation, he may be held liable  
10 for his otherwise defensive use of deadly force.” *Billington v. Smith*, 292 F.3d 1177,  
11 1189 (2002). The application of deadly force, even if it is by itself reasonable, is  
12 rendered “*unreasonable* as a matter of law” because was proximately caused by the  
13 “initial unconstitutional provocation.” *Id.* at 1190-91.

14 The FAC does not allege that Yañez was provoked, who provoked Yañez, or  
15 what Fourth Amendment violation provoked Yañez, all essential elements of an  
16 unconstitutional provocation claim. *See Jones*, 733 F.2d at 649.

17 Even if the FAC put Defendants on notice that Plaintiffs were proceeding on an  
18 unconstitutional provocation claim, the FAC does not allege sufficient facts to make  
19 such a claim plausible. Under Murrieta’s version of events, Agent Diaz’s shooting of  
20 Yañez was done “without warning or *provocation*.” (ECF No. 25 at 14) (emphasis  
21 added). Under Agent Nelson’s version of events, there is not alleged to have been any  
22 unconstitutional activity prior to the shooting of Yañez. The Court concludes that the  
23 FAC does not state a Fourth Amendment claim against Agent Nelson on a provocation  
24 theory.

## 25 **III. Failure to Intervene**

26 “[P]olice officers have a duty to intercede when their fellow officers violate the  
27 constitutional rights of a suspect or other citizen.” *United States v. Koon*, 34 F.3d 1416,  
28 1447 n. 25 (9th Cir. 1994), *rev’d on other grounds*, 518 U.S. 81 (1996). “Importantly,

1 however, officers can be held liable for failing to intercede only if they had an  
2 opportunity to intercede.” *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000).

3  
4 Plaintiffs allege that Diaz, “pulled away from the scuffle with Murrieta . . .  
5 removed his sidearm from its holster, uttered not a single additional word, and shot  
6 Yanez in the head.” (ECF No. 25 at 12). On these facts, Agent Nelson had no  
7 opportunity to intervene because he was in the middle of a scuffle with Murrieta, and  
8 he was given no indication from Agent Diaz that deadly force would be used. Plaintiffs  
9 have failed to state a Fourth Amendment claim against Agent Nelson for failing to  
10 intervene.

#### 11 **IV. Conclusion**

12 The Motion to Dismiss Plaintiffs’ Fifth Claim as against Nelson is granted.  
13 Plaintiffs have not stated a plausible secondary liability claim against Agent Nelson for  
14 the shooting of Yañez.

#### 15 **iii. Fifth Amendment Due Process (Claims Two and Three)**

16 Plaintiffs’ Second and Third Claims, brought under the Due Process Clause  
17 against the Supervisor and Agent Defendants, respectively, mirror their Fourth  
18 Amendment claims. Defendants contend that excessive force claims in the context of  
19 a seizure are governed solely by the Fourth Amendment, barring any Due Process  
20 claims in this case. Defendants further contend that any rights conferred by the Due  
21 Process Clause in this instance are not “clearly established.” (ECF No. 27-1 at 23-24).  
22 Plaintiffs contend that this limitation, as established by *Graham v. Connor*, 490 U.S.  
23 386 (1989), does not apply to this case because Yañez is not a citizen, and it is plausible  
24 under the facts alleged that Yañez was not seized.

25 “Violation of the Fourth Amendment [right to be free from unreasonable  
26 seizures] requires an intentional acquisition of physical control.” *Brower v. County of*  
27 *Inyo*, 489 U.S. 593, 596 (1989). An officer’s intent or motive in applying force is of no  
28 importance. *Nelson v. City of Davis*, 685 F.3d 867, 877 (9th Cir. 2012). Instead, “[t]he

intentionality requirement is satisfied when the ‘termination of freedom of movement [occurs] *through means intentionally applied*.’” *Id.* at 876 (citing *Brower*, 489 U.S. at 597) (emphasis in original). It is sufficient, but not necessary, that a “person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.” *Brower*, 489 at 599. “Where . . . the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment...” *Graham v. Connor*, 490 U.S. 386, 394 (1989).

Plaintiffs have failed to state a viable Due Process Claim as to any defendant. Regardless of Agent Diaz’s subjective motivation in shooting Yañez, Plaintiffs allege Agent Diaz intentionally shot and killed Yañez. Yañez’s freedom of movement was unquestionably restrained. Because Plaintiffs have alleged a seizure, their excessive force claims are “most properly characterized as [claims] invoking the protections of the Fourth Amendment.”<sup>6</sup> *Id.* at 394.

The Motion to Dismiss Plaintiffs’ Second and Third Claims is granted as to all Defendants.

#### **iv. Fifth Amendment Equal Protection (Claims Six and Seven)**

Plaintiffs allege that the Rocking Policy reflects intentional discrimination “against Yañez and others on the basis of their Hispanic descent and perceived Mexican origin,” and is “one part of a broader U.S. effort to ‘get tough’ on unauthorized immigration by persons of Hispanic descent and Mexican nationality.” (ECF No. 25 at 35). Plaintiffs allege that this practice is discriminatory because there is no such policy implemented at the Northern Border, no other law enforcement agencies in the country have adopted a policy like the Rocking Policy, and Defendants would not execute such a policy against Canadians or Caucasians. As to the Agent Defendants,

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<sup>6</sup> *Graham*’s requirement that excessive force claims be brought under the Fourth Amendment is not limited to U.S. citizens. The Court used the term “free citizen” to distinguish from the prison context, where the Eighth Amendment also protects against physical abuse. *Graham*, 490 U.S. at 394-95.

1 Plaintiffs allege that excessive force was used solely because of his “race, ethnicity,  
2 and/or perceived national origin.” *Id.* at 47.

3 Defendants contend that the discrimination allegations are conclusory and do not  
4 give rise to an inference of discriminatory intent. As to the Supervisor Defendants,  
5 Defendants contend that allegations of mere knowledge or acquiescence are insufficient  
6 to state an Equal Protection claim premised on supervisory liability. Plaintiffs do not  
7 contend that knowledge or acquiescence is sufficient to state a claim, but instead  
8 contend that the Rocking Policy was implemented with racial animus.

9 “Where the claim is invidious discrimination in contravention of the First and  
10 Fifth Amendments . . . the plaintiff must plead and prove that the defendant acted with  
11 discriminatory purpose.” *Iqbal*, 556 U.S. at 676. “[P]urposeful discrimination requires  
12 more than ‘intent as volition or intent as awareness of consequences.’” *Id.* at 677. For  
13 an Equal Protection claim premised on supervisory liability, a plaintiff must “plead  
14 sufficient factual matter to show that [a defendant] adopted and implemented the ...  
15 policies at issue not for a neutral ... reason but for the purpose of discriminating on  
16 account of race, religion, or national origin.” *Id.* at 677.

17 The conclusory allegation that the Rocking Policy was implemented and carried  
18 out on persons “on the basis of their Hispanic descent and perceived Mexican origin”  
19 is not entitled to an assumption of truth. The same is true for the allegation that the  
20 Agents shot Yañez “on the basis of his Hispanic descent and Mexican origin.”  
21 Although the FAC alleges that the Rocking Policy is only carried out along the Souther  
22 Border and only against Mexicans and persons of Hispanic descent, there is an “obvious  
23 alternative explanation” for this perceived discrimination. *Iqbal*, 556 U.S. at 682. On  
24 the facts alleged, “[i]t should come as no surprise that a ... policy directing [Border  
25 Patrol agents to treat instances of rock throwing at the Souther Border as deadly force]  
26 would produce a disparate, incidental impact on [Mexican nationals and persons of  
27 Hispanic descent], even though the purpose of the policy was to target neither [Mexican  
28 nationals or persons of Hispanic descent].” *Id.* The Court concludes that Plaintiffs have

1 failed to state an Equal Protection claim for intentional discrimination.

2 The Motion to Dismiss Plaintiffs' Sixth and Seventh Claims is granted.

3 **V. Motions to Dismiss Request for Attorneys' Fees as Unrecoverable (ECF Nos.**  
4 **26, 27)**

5 Defendants contend that Plaintiffs are not entitled to attorneys' fees in a *Bivens*  
6 action. Plaintiffs contend that striking the request is premature at the motion to dismiss  
7 stage.

8 The Motion to Dismiss Plaintiffs' prayer for attorneys' fees is denied as  
9 premature. *See Nurse v. U.S.*, 226 F.3d 996, 1005 (9th Cir. 2000) (reversing order  
10 denying fees as "premature" because "this litigation is in its early stages," despite the  
11 fact that "appellant has not justified her prayer for attorney's fees relating to her *Bivens*  
12 claims").

13 **VI. Conclusion**

14 IT IS HEREBY ORDERED that the Order on the Joint Motion to Dismiss (ECF  
15 No. 34) is AMENDED as follows. Plaintiff's Second, Fourth, and Sixth Claims for  
16 relief are DISMISSED WITH PREJUDICE as to DHS.

17 IT IS FURTHER ORDERED that the Government Defendants' and Supervisor  
18 Defendants' Motion to Dismiss (ECF No. 26) is GRANTED in part and DENIED in  
19 part. Plaintiffs' First Claim for violation of the law of nations is DISMISSED. The  
20 Motion to Dismiss Plaintiffs' prayer for attorneys' fees is DENIED.

21 IT IS FURTHER ORDERED that the Supervisor Defendants and Agent  
22 Defendants' Motion to Dismiss (ECF No. 27) is GRANTED in part and DENIED in  
23 part. The Motion to Dismiss Defendants Aguilar, McAleenan, and Winkowski for lack  
24 of personal jurisdiction is GRANTED. Plaintiff's Second, Third, Sixth and Seventh  
25 Claims for Due Process and Equal Protection violations are DISMISSED without  
26 prejudice. Plaintiff's Fourth Claim is DISMISSED without prejudice as to Defendants  
27 Napolitano, Bersin, Beeson, Barlow, and Scott. The motion is DENIED to the extent  
28 it seeks dismissal of Defendant Fisher from Plaintiff's Fourth Claim. Plaintiffs' Fifth




1 Claim is DISMISSED without prejudice as to Agent Nelson. The Motion to Dismiss  
2 Plaintiffs' prayer for attorneys' fees is DENIED.

3 IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to Conduct  
4 Jurisdictional Discovery (ECF No. 31) is DENIED.

5 No later than thirty (30) days from the date this Order is filed, Plaintiffs may file  
6 a motion for leave to amend the First Amended Complaint, accompanied by a proposed  
7 second amended complaint.

8 DATED: September 3, 2014

9   
10 **WILLIAM Q. HAYES**  
11 United States District Judge  
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